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Presidential Power: Should Bill Clinton be immune from lawsuits on allegations of past acts?


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Presidential Power

Should Bill Clinton be immune from lawsuits on allegations of past acts?

When former Arkansas state employee Paula Jones filed her complaint against Bill Clinton she joined a small group of women who have publicly accused men in high-profile positions of sexual harassment.

A classic "he said, she said" story? We may never know, if the president is able to argue successfully that his office shields him from liability for actions occurring prior to assuming it. On June 27, his lawyer, Robert Bennett, asked a federal court to delay action, and said he would be filing a separate motion in August on the issue.

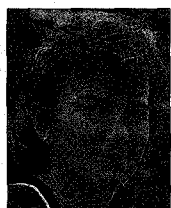
The defense is based on the 1982 case of

Nixon v. Fitzgerald, which conferred absolute immunity from lawsuits arising from the exercise of presidential power.

A better solution, says Georgetown law professor Susan Low Bloch, is granting the president "temporary immunity" instead, which would put Jones' lawsuit on hold until Clinton is out of office.

Pardoning the president for acts committed in the past is unwarranted, warns Steven R. Shapiro, the ACLU's national legal director in New York. Immunity attaches to the office, not the person, he says.

Yes: Nation's agenda more important than a speedy trial



BY SUSAN LOW BLOCH

The Constitution protects the presidency from crippling incursions from the other branches of government. In 1982, the Supreme Court held in *Nixon v. Fitzgerald* that the president was absolutely immune from damage suits for injuries inflicted in his official capacity as president, no matter how intentional the wrong. The danger to the presidency from such lawsuits was so great, said the Court, that it outweighed the damage done to plaintiffs denied the right to sue.

Suits against a sitting president for actions taken *before* assuming office raise two concerns expressed in *Fitzgerald*. Regardless of when the injury occurred, defending lawsuits is time-consuming and distracting.

Moreover, if suits against the president are permitted, they surely will proliferate; as the Supreme Court noted, the "sheer prominence" of the office makes the president a particu-

larly attractive target.

While absolute immunity is required to protect the integrity of presidential decision-making, something less comprehensive—a limited temporal immunity—is needed when the president is being sued for injuries allegedly inflicted prior to the presidency or otherwise outside its scope. Staying the action or tolling the statute of limitations until the president leaves office is sufficient to accommodate the need to protect both the functioning of the presidency and the rights of alleged victims. Such a practice—staying the lawsuit—occurs when someone in the military is sued and should be appropriate for the president.

Even the dissenters in *Fitzgerald* did not dispute that suits against the president are disruptive, distracting and likely to proliferate. Their only concern was that absolute immunity would make it too easy for presidents to violate citizens' constitutional rights with impunity. But that is not a concern with temporary immunity. As soon as the president leaves office, the alleged victim would be free to sue the former president.

Granted that delaying the lawsuit may present some difficulties for the individual plaintiff, but those costs are clearly outweighed by the nation's collective need for a full-time president undistracted by depositions and trial strategies.

This does not mean the presi-

dent is above the law. It is not a question of whether the president can be sued; it is only a question of when. It also does not mean, as some have contended, that divorce actions and child custody disputes can be postponed for years. Only in the case of civil damage actions do the costs associated with delaying the plaintiff's case outweigh those resulting from having the president defend the lawsuit while in office.

By contrast, when a plaintiff needs immediate relief and seeks, for example, an injunctive or structural remedy (such as in divorce and child custody actions), the need for prompt adjudication is obvious and, generally, would outweigh the costs of suing a sitting president. This is a balancing test and, while no solution is perfect, the flexible nature of the balancing process makes it possible to accommodate both sides of the scale in most cases.

Given that the most sensational accusations are today the most popular, most remunerative, and often most difficult to resolve on the pleadings, it is vital that a sitting president not have to spend time and energy defending a plethora of damage suits by every eager plaintiff. Such distraction and diversion would, in the words of the *Fitzgerald* Court, "redound to the detriment not only of the President and his office but also the Nation that the Presidency was designed to serve."

Susan Low Bloch, a professor at Georgetown Law Center, teaches constitutional law, communications law and federal jurisdiction.